

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

APR 16 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of Part 1 of the)

Commission's Rules --)

Competitive Bidding Proceeding)

WT Docket No. 97-82

REPLY COMMENTS OF MOUNTAIN SOLUTIONS, LTD., INC.

Mountain Solutions LTD., Inc. ("Mountain Solutions"), by its counsel and pursuant to 47 C.F.R. § 1.415, hereby files these Reply Comments in the captioned proceeding.¹ Consistent with its Comments in this proceeding, Mountain Solutions' Reply Comments urge the Commission to adopt the proposed modification (as revised herein) to Section 1.2110(e) of its rules, and to ensure that all late payment rule revisions adopted apply to broadband PCS C block licensees, including pending late payment proceedings.²

I. Current Marketplace Realities Compel Flexible Payment Options

The FCC's general auction down payment rule presently provides that winning bidders who are late making their second down payments *automatically default* on their licenses, and are subject to the Commission's default penalties.³ Of the parties that commented on the

¹ Order, Memorandum Opinion and Order and Notice of Proposed Rule Making in WT Docket 97-82, FCC 97-60, released February 28, 1997 (hereinafter "NPRM").

² Specifically, Mountain Solutions has a pending *Emergency Petition for Waiver* of the C block second down payment requirement. See *Emergency Petition for Waiver*, In the Matter of Mountain Solutions Ltd., Inc., FCC Account No. 0841199078 - Request for Waiver of Rule Section 24.711(a)(2), filed September 24, 1997, as supplemented October 17, 1996 and February 12, 1997.

³ 47 C.F.R. §1.2110(e); see also NPRM at ¶¶ 60-63.

Commission's proposed payment rule modifications, Mountain Solutions and *all but one* commenter support a relaxation of the FCC's strict payment rules, in order to provide flexibility for auction winners who previously made timely payments. The vast majority of commenters specifically addressing the late *second* down payment issue favor payment flexibility for entities that have already made a timely first down payment⁴; however, the proposed specifics of the late second down payment process vary among commenters.

In addition to Mountain Solutions, other commenters suggested revisions to liberalize the FCC's proposed 10 day late payment period and 5% late fee. For example, while Mountain Solutions advocates a 30 day, rather than 10 business day, late payment period, Airadigm "disagree[s] with the Commission's view of an acceptable late payment period"⁵ and recommends a 60 day late payment period from the time of the announced deadline. Furthermore, Pocket Communications, Inc. opposes the proposed late fee rule modifications only because it opposes the imposition of *any* late fees for late payments.⁶ According to Pocket, burdening licensees, which are in a situation of financial distress at the outset of their license term, with late fees "would only aggravate their financial difficulties. And if such fees were due in order to obtain the grace period, . . . many licensees would simply be unable to pay them" and thereby make the grace periods unavailable.⁷

⁴ See Comments of AT&T Wireless Services, Inc. at p. 4 ; Comments of the American Mobile Telecommunications Association, Inc. at pp. 12-13; Joint Comments of the Coalition of Institutional Equity Investors at p. 16; Comments of Airadigm Communications, Inc. et al. at p. 13 ("Airadigm"); Comments of Airtouch Paging and Powerpage, Inc. at pp. 7-8.

⁵ Airadigm Comments at p. 13.

⁶ See Comments of Pocket Communications, Inc. at p. 7-10 ("Pocket").

⁷ Comments of Pocket Communications, Inc. at p. 7.

Clearly, given the broad and diverse support on the record for more flexible late payment rules, relaxation of Section 1.2110(e) is warranted. Moreover, as discussed below, given the present realities of the capital markets, and PCS entrepreneurs' increasing difficulties in raising capital to meet various debt obligations, Mountain Solutions' 30 day late payment period proposal is the minimum late payment period that the FCC should consider.

In addition to the broad record support for a modified late payment procedure, the present financial environment virtually demands that the Commission provide entrepreneurs (especially C block licensees) with more flexibility in meeting FCC debt obligations. As noted above and in its Comments, Mountain Solutions has a vested interest in the Commission's resolution of this particular issue because Mountain Solutions has a pending request for waiver of Section 24.711(a)(2) of the Commission's rules, pertaining to 10 C Block broadband PCS licenses for which Mountain Solutions was the high bidder at auction, and for which it timely filed its approximately \$1.2 million first down payment.⁸

In its Emergency Petition for Waiver filed last fall, and later-filed supplements, Mountain Solutions sought relief based upon the deterioration of the capital markets forewarned the Commission that draconian adherence to rigid payment rules would have dire financial consequences for PCS entrepreneurs, which ultimately would lead to C block

⁸ As explained previously, Mountain Solutions was the high bidder for ten PCS C block BTA licenses. Although it timely made its first down payment of over \$1.2 million, Mountain Solutions did not meet the September 24, 1996 second down payment deadline. Instead, it filed an *Emergency Petition for Waiver*, which was supplemented on October 17, 1996 and February 12, 1997. As of April 16, the Commission has not ruled on Mountain Solutions' *Emergency Petition for Waiver*.

licensee defaults.⁹ Unfortunately for all parties involved, recent events highlight that Mountain Solutions' predictions are coming to fruition. For example, two highly relevant events were announced on the *same day* two weeks ago. First, on March 31, 1997, Pocket Communications, the second largest C block licensee, announced that it had filed for Chapter 11 bankruptcy protection from its creditors while it reorganizes its operations and restructures its finances to cover its debt, most notably the \$1.43 billion due to the U.S. Treasury in installment payments.¹⁰ In its Comments in this proceeding, filed four days before filing for Chapter 11 bankruptcy protection, Pocket advised the FCC that C block licensees "have simply found themselves unable to raise capital in the compressed time frame to make those [installment] payments."¹¹

Later in the day, the Commission released an Order suspending all C block installment payments indefinitely while it considered, *inter alia*, a petition filed by nine C block licensees (including Pocket/DCR) to modify existing quarterly installment payment obligations and convert them to annual installment payment obligations.¹² Similarly, C block licensees are

⁹ See *Emergency Petition; Supplement to Emergency Petition for Waiver*, filed on October 17, 1996; *Reply of Mountain Solutions, Ltd., Inc.*, filed on November 1, 1996; *Second Supplement to Emergency Petition for Waiver*, filed on February 12, 1997.

¹⁰ See "Pocket Seeks Chapter 11 Bankruptcy Protection", *Telecommunications Reports*, April 7, 1997 at 13 [hereinafter "Pocket Seeks Chapter 11"].

¹¹ Comments of Pocket Communications, Inc. at p. 7.

¹² See *Order, In the Matter of Installment Payments for PCS Licenses*, DA 97-649, released March 31, 1997. Among the justifications advanced by the nine petitioners in their installment payment modification petition was the fact that since the FCC originally formulated its auction rules, the financial climate in which small businesses operate has changed fundamentally. The petitioners also noted that "the money pool for the C-Block was extremely tight". Letter to Michele Farquhar from Thomas Gutierrez, et al., dated March 13, 1997.

facing an unfavorable "catch 22" situation wherein Wall Street's negative reaction to C block licensees' major debt load causes C block licensees to struggle to raise necessary capital to make installment payments, and the capital they do raise is more expensive. One striking result is that NextWave Telecom, Inc., Pocket Communications, Inc. and General Wireless, Inc., the three largest C block licensees, have indefinitely postponed public stock offerings.¹³

Also notable is the fact that the capital markets are not the only interested parties concerned about the financial viability of C block licensees. The Senate Commerce Committee has scheduled a congressional hearing on spectrum auction issues for next week, April 22, 1997. Among other issues, the Committee will examine what action Congress can take to guard against future auctioned license defaults, and to possibly prevent anticipated C block license defaults stemming from negative financial market conditions, that are only exacerbated by strict FCC payment policies.¹⁴

II. Flexible Late Payment Rule Revisions Should Apply to C Block Licensees

In the *Notice of Proposed Rule Making* in this proceeding, the Commission proposes that any revised rules adopted apply to all future auctions and pending proceedings where auctions have not yet been held.¹⁵ Because this issue was not addressed directly by the majority of the commenters, Mountain Solutions desires that the record in this proceeding reflect the compelling need for application of revised payment rules to all existing auction

¹³ See "Spectrum Legislation Designed to Get Hold on Wireless Licensing", *RCR*, April 7, 1997, p. 10 [hereinafter "Spectrum Legislation"]; "Pocket Seeks Chapter 11" at 13.

¹⁴ See "Spectrum Legislation" at p. 10; "Senate Commerce Preparing Spectrum Auction Legislation", *Telecommunications Reports*, April 7, 1997 at p. 28.

¹⁵ See *NPRM* at ¶ 18.

winners, in addition to future auction winners.¹⁶ As detailed above, the need for immediate, flexible payment rule revisions is especially acute in the C block context.¹⁷

Mountain Solutions can attest directly to the need for second down payment flexibility.¹⁸ In addition, given the FCC's recent suspension of C block installment payments, the Commission has also now acknowledged the harsh capital marketplace realities that are facing C block licensees. Mountain Solutions' difficulty in meeting the C block second down payment deadline last fall was simply one of the earliest manifestations of the looming financial problems that were about to beset C block licensees. The Commission's recognition of the current negative financial environment, and its substantial impact on C block licensees, is demonstrated by both the flexible payment rule revisions proposed in this rule making and the suspension of C block installment payments. This realistic approach should also be applied to existing C block proceedings, such as Mountain Solutions' waiver proceeding, where payment deadlines have been missed.

In sum, not only is a relaxed late second down payment rule good policy and supported by the record in this proceeding, it is virtually essential to the continued financial

¹⁶ In addition, Mountain Solutions notes that basic principles of due process require that the government treat similarly situated parties alike, such as small businesses participating in FCC auctions. *See, e.g., McElroy Electronics Corp.*, 990 F.2d 1351, 1365 (D.C. Cir. 1993).

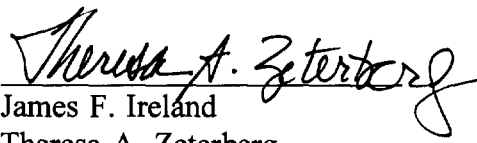
¹⁷ Accordingly, any necessary revisions to Part 24 of the rules, and 47 C.F.R. § 24.711(a)(2) in particular, should be made to ensure that the contemplated rule changes will apply to C block licensees, such as Mountain Solutions in its pending waiver proceeding.

¹⁸ As mentioned above, Mountain Solutions has a pending emergency request for waiver of the broadband PCS entrepreneur block second down payment rule. Furthermore, as a *true* woman-controlled small business without "deep pocket" non-attributable investors, Mountain Solutions is all too familiar with the "market entry barriers facing small businesses", especially those relating to obtaining financing.

viability of a sizeable segment of C block small business licensees, which Congress specifically intended to participate in the PCS industry.

ACCORDINGLY, Mountain Solutions urges the Commission to modify Section 1.2110(e) of its rules to provide for more flexibility for auction winners that have already made timely, significant payments to the federal government.

Respectfully submitted,
MOUNTAIN SOLUTIONS LTD., INC.

By: 
James F. Ireland
Theresa A. Zeterberg
Its Counsel

COLE, RAYWID & BRAVERMAN, L.L.P.
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
(202) 659-9750

April 16, 1997

CERTIFICATE OF SERVICE

I, Colleen M. Riley, a secretary in the law firm of Cole, Raywid & Braverman, L.L.P., do hereby certify that I have on this 16th day of April, 1997, had copies of the foregoing "Reply Comments of Mountain Solutions, Ltd., Inc." mailed by U.S. first class mail, postage prepaid, to the following:

David L. Nace
B. Lynn F. Ratnavale
LUKAS, MCGOWAN, NACE &
GUTIERREZ, CHARTERED
1111 Nineteenth Street, NW
Suite 1200
Washington, D.C. 20036
Counsel for Liberty Cellular, Inc.

*Daniel B. Phythyon, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW
Room 5002
Washington, DC 20554

*Sandra Danner
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW
Room 7130-H
Washington, DC 20554

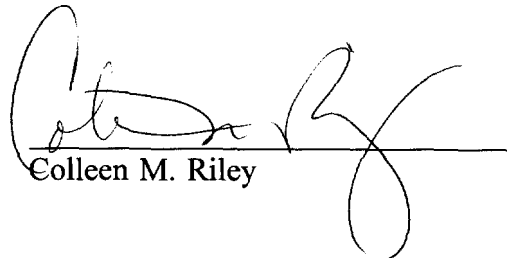
*Mark Bollinger
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW
Room 5604
Washington, DC 20554

*Julius Genachowski
Office of Chairman Hundt
Federal Communications Commission
1919 M Street, NW
Room 814
Washington, DC 20554

*Rudy Baca
Office of Commissioner Quello
Federal Communications Commission
1919 M Street, NW
Room 802
Washington, DC 20554

*David Siddall
Office of Commissioner Ness
Federal Communications Commission
1919 M Street, NW
Room 832
Washington, DC 20554

*Suzanne Toller
Office of Commissioner Chong
Federal Communications Commission
1919 M Street, NW
Room 844
Washington, DC 20554


Colleen M. Riley

April 16, 1997

*Via Hand Delivery